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NO. 86-1607

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

ALTON J. BAILEY,

Petitioner

VERSUS

RYAN STEVEDORING COMPANY, INC., ET AL,

Respondents

On Petition for a Writ of Certiorari
to the United States Court
of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Local 1830 and Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Alton J. Bailey
Johnnie A. Jones, Esq.
Ryan-Walsh Stevedoring Company, Inc.
Mathews, Atkinson, Guglielmo, Marks & Day
Rogers Terminal and Shipping Corporation
Gardner, Robein & Healey
Louisiana Stevedores, Inc.
Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman
Ramsay, Scarlett and Company, Inc.
Baton Rouge Marine Contractors, Inc.
Local 1830 and Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO
Baton Rouge Steamship Association

RESPECTFULLY SUBMITTED,

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IN THE
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NO. 86-1607

ALTON J. BAILEY,

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VERSUS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

There is no necessity for this Court to grant a Writ of Certiorari in this case. Having failed to prove a single one of his claims of discrimination, Petitioner was properly found not to be the "prevailing party" by both the District Court and the United States Court of Appeals, Fifth Circuit, and he is, therefore, not entitled to an award of attorney's fees under 42 U.S.C. 2000 e-5 (k).

In addition, the facts of this case evidence the existence of special circumstances which justified the lower courts' denial of an attorney's fee award to Petitioner.

The mandate which issued from the Court of Appeals ordering the merger of ILA Local Unions 1830 and 1833 issued in the course of this matter as a result of a *sua sponte* finding of the Court. This merger order was an expansion of the law, legally unanticipated by either of the merged local Unions. There being no culpable action or inaction by the Respondent Local Unions, the imposition of an award of attorney's fees against their members would be unjust.

On the basis of the demonstrated special circumstances of this case, the District Court properly exercised the discretion granted to it in denying an award of attorney's fees to Petitioner.

ARGUMENT

The lower courts' denial of an award of attorney's fees to Petitioner Alton J. Bailey for his failed attempt to prove racial discrimination on the part of several Baton Rouge, Louisiana, stevedoring companies and Local Unions 1830 and 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, Respondents herein, is consistent with the standards governing attorney's fee awards enunciated or approved by this Court, and presents no issue of a gravity warranting the granting of a writ of certiorari.

Petitioner seeks over $300,000.00 in attorney's fees for the prosecution of a race discrimination suit against the Respondents in which Petitioner lost on every claim he advanced. By any measure, he was not the "prevailing party", and his claim for fees was properly denied.

Bailey's claim is predicated on Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), which provides in pertinent part as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee as part of the costs.

This provision is one of the limited exceptions to the "American Rule" that litigants must pay their own attorney's fees.[1] *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 95 S.Ct. 1612 44 L.Ed.2d 141 (1975).

In interpreting a similar fee award statute in Title II of the Civil Rights Act of 1964, this Court held that a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). This standard is applicable to fee award claims under §706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). *Christianburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978).

A. Petitioner is not the prevailing party.

In order to succeed in his fee award claim, Petitioner must demonstrate that he is the "prevailing party". The central allegation of Petitioner's Complaint, the core of this controversy, was the allegation of actual racial discrimination against Petitioner and similarly situated persons in the employment practices of the defendant stevedoring companies. Paragraph VI, Complaint of Alton J. Bailey, Petition for Writ of Certiorari, page 7-0. The defendant Local Unions were alleged to be racially segregated organizations and parties to a collective bargaining

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[1] Another exception is 42 U.S.C. §1988. It also allows attorney's fees to prevailing parties and cases interpreting §1988 can be applied to §706(k). See *Hanrahan v. Hampton,* 446 U.S. 754, 100 S.Ct. 1987 64 L.Ed.2d 670 (1980).

agreement which divided stevedoring jobs on a 50/50 basis between the Unions, thus furthering the discrimination of which Petitioner complained. *Ibidem.*

The District Court found, and the Court of Appeals, Fifth Circuit, affirmed, that the Petitioner did not prove his allegations of actual racial discrimination. However, the Fifth Circuit ordered the merger of the separate local unions on grounds that their continued separate existence presented "a threat of employment discrimination". *Bailey v. Ryan Stevedoring Company, Inc.*, 528 F.2d 551, 556, 557 (5th Cir. 1976).

The merger was not requested by the Petitioner in his Complaint. Instead, his prayer requested, in part, injunctive relief against the local unions' "continuing to maintain racially segregated organizations". Prayer, Paragraph 2, Complaint of Alton J. Bailey, Petition for Writ of Certiorari, page 11-0. The insinuation that these local Unions were racially separated as a matter of Union policy was given the lie by 204 of the approximately 230 members of Local 1830, the "Black" local, who, in opting-out of Bailey's class, averred that they understood that membership in the "White" local was available to them on request. *Bailey v. Ryan Stevedoring Company, Inc.*, 528 F.2d 551, 553 (5th Cir. 1976).

The very Court which ordered the merger held that its order was insufficient grounds to classify the Petitioner as the "Prevailing Party" for purposes of awarding attorney's fees. *Bailey v. Ryan Stevedoring Company, Inc.*, United States Court of Appeals, Fifth Circuit, No. 86-3604, Petition for Writ of Certiorari, Appendix "A".

As this Court noted in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983), the term "prevailing party" has been defined in various ways.

The Fifth Circuit Court of Appeals has consistently employed a test which asks whether the plaintiff "has been successful on *the central issue*. . .as exhibited by the fact that he has acquired the *primary relief sought*." *Commonwealth Oil Refining Company v. E.E.O.C.*, 720 F.2d 1383, 1385 (5th Cir. 1983), quoting *Iranian Student's Association, v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979). (emphasis in original).

> While it may not lend itself easily to further articulation, this single test provides a common sense, pratical yardstick of success. In many, if not most lawsuits, whether tried or settled, it is possible to compare the allegations made with the results obtained and pick out a winner: A plaintiff who carried the day on his major claim, a defendant who defeated the major thrust of the suit. In other cases it may be that neither party could fairly be said to have carried the day, and in such event there should be no fee award to either.

Commonwealth Oil, supra, at 1385, 1386.

The Fifth Circuit refined and reaffirmed the "central issue" test in *Uviedo v. Steves Sash and Door Co.*, 753 F.2d 369 (5th Cir. 1985), holding that consistency with *Hensley, supra*, required that the central issue test be applied to each "unrelated claim" standing alone. This Court denied a Petition for Writ of Certiorari in the matter. *Uviedo v. Steves Sash & Door Company*, -U.S.- 106 S.Ct. 791 (1986).

The central issue test is, admittedly, not as "generous" a standard as that employed in some of the other Circuit Courts, which ask whether the plaintiff succeeded on "any significant issue". *See, e.g., Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978).

But, even in those Circuits which utilize the "any

significant issue" tests, the primary focus is on whether the relief sought by the plaintiff was, in fact, obtained. Petitioner fails to meet this standard.

For example, the Third Circuit has effected the "prevailing party" determination by looking to the "substance of the litigation's outcome", *Ross v. Horn,* 598 F.2d 1312, 1322 (3rd Cir.1979), and in *Abraham v. Pekarski,* 728 F.2d 167, 175 (3rd Cir. 1984) found that although a plaintiff did not prevail on all of the legal theories he advanced, he was nevertheless entitled to a fee award because "he obtained the relief he sought." Other circuits have inquired as to whether the litigation achieved some "benefit" the parties sought in bringing suit. *See, e.g. Nadeaux v. Helgemoe, supra,* at 279; *Gingras v. Lloyd,* 740 F.2d 210, 212 (2nd Cir. 1984).

In *Bonnes v. Long,* 599 F.2d 1316 (4th Cir. 1979) the Fourth Circuit, which also utilizes the "any significant issue"analysis, offered guidelines for the resolution of the "prevailing party" question.

> This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark conditon.

Id. at 1319

Even this relaxed standard affords the Petitioner no comfort. The condition that the claimant sought to change was the alleged actual racial discrimination in the awarding of jobs on the waterfront. He failed to show that this discrimination existed.

Neither can he demonstrate that he enjoys a tangible benefit from the merger ordered by the Appeals Court. The merger was ordered for the purpose of removing the "threat" of discrimination in the allocation of longshoremen's jobs among whites and blacks. But the imminence of this threat was never demonstrated by the Petitioner. In fact, the Court of Appeals found that it was the Petitioner's own failure to present himself for work which resulted in his lower-than-average employment, and that no action of the defendants had deprived the Petitioner of any benefit. *Bailey v. Ryan Stevedoring Company, Inc.*, 528 F.2d 551, 555 (5th Cir. 1976).

In *Harrington v. Vandolia-Butler Board of Education* 585 F.2d 192 (6th Cir. 1978) the Sixth Circuit, which also uses the "central issue" test, (*see, Kentucky Association for Retarded Citizens v. Conn*, 718 F.2d 182 (6th Cir. 1983)) denied attorney's fees to a plaintiff who, although she successfully showed that she was discriminated against on the basis of sex, could not show entitlement to any relief under Title VII §706(k) in the nature of compensatory damages.

Plaintiff Harrington proved her allegations but, because she could not show entitlement to relief, went uncompensated for legal fees. Plaintiff Bailey proved nothing that would have entitled him to relief and should similarly be unrewarded. His "relief" in this matter was fashioned by the Court of Appeals for a threat of harm perceived by the Court but unproven by the Petitioner.

The factual condition that the Petitioner sought to change was the alleged actual racial discrimination against him individually and against the class of black persons he sought to represent. That his claims were not common to the class is eloquently demonstrated by the fact that almost his entire union's membership opted out of his lawsuit and denied that the segregation of the unions was involuntary. *Bailey, supra* at 553.

The central issue test used by the Fifth Circuit, as it has been applied, does not lead to radically different results than does the "any significant issues" test used in other Circuits. Further, the use of the "any significant issues" test would not have resulted in a different holding on the attorney's fees award question in this matter. There is, therefore, no need of further review.

B. Special Circumstances Exist in this Case, Justifying the Denial of an Attorney's Fee Award.

It is indisputable that the Respondents had not the slightest culpability with respect to the Petitioner's claims of racial discrimination. Petitioner failed to prove that he was discriminated against on the basis of race by either the Unions or the stevedoring companies, failed to show that his grievance was maintainable as a class action and failed to show that there was any actual discrimination as a result of the 50/50 hiring rule used by the Respondent Unions and Companies. *Baily v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551 (5th Cir. 1976).

The mandate for the merger of the Local Unions was in the nature of a *sua sponte* recognition by the Court of Appeals that a potential for discrimination existed, that a threat of a violation of 42 U.S.C. 2000e-2(c)(2) was present. *Bailey, supra* at 557.

A prevailing plaintiff in a Title VII suit "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

Respondents submit that the facts of this case present precisely those "special circumstances" which would render an award of fees against them unjust.

The Respondent Unions cannot be charged with constructive knowledge of what the Fifth Circuit found to be a violation of Title VII when the parameters of the violation had not yet been established in the Circuit. Despite Petitioner's failure to prove actual discrimination as a result of the maintenance of separate local unions, the Fifth Circuit remanded this matter to the District Court for entry of an injunction merging the unions. *Bailey, supra* at 557. In so ruling, the Fifth Circuit denied that it needed to reach the issue of whether the maintenance of separate local unions constituted a *per se* violation of 42 U.S.C. 2000e-2(c)(2). But this denial was far from clear to at least one Fifth Circuit Judge, *see, Bailey v. Ryan Stevedoring Company, Inc.,* 533 F.2d 976 (5th Cir. 1976), dissenting opinion of Clark, J., and one District Judge, who concluded that the Fifth Circuit had, in fact, adopted a *per se* rule in *Bailey* despite its denial. *Williams v. New Orleans Steamship Association,* 466 F.Supp. 662, 680 (E.D. LA 1979), rev'd on other grounds, 673 F.2d 742 (5th Cir. 1982)

Blamelessness on the part of a party litigant sought to be cast for a fee award has been found to be a special circumstance justifying the denial of the fee award. In *Chastang v. Flynn & Emrich Co.,* 541 F.2d 1040 (4th Cir. 1976) a fee award was denied to successful sex discrimination plaintiffs on the basis that the defendants had no right to unilaterally alter the offending retirement fund plan, no

economic incentive to violate the law and had acted "with reasonable dispatch [to correct the plan's offensive provisions] as soon as a murky area of the law was clarified." *Id.* at 1045. *Accord, Staten v. Housing Authority of the City of Pittsburgh,* 638 F.2d 599 (3rd Cir. 1980); *Joseph L. v. Office of Judicial Support,* 638 F.Supp. 833 (E.D. Pa. 1986).

It is clear from the record in this matter that the over whelming majority of the members of Local 1830, the "Black" local, for whose ostensible benefit the merger was mandated, neither sought nor desired merger with the "White" local. *Bailey v. Ryan Stevedoring Company, Inc.* 528 F.2d 551, 553 (5th Cir. 1976). Nevertheless, once merger was ordered, merger was had expeditiously, save for the "numerous problems caused by the plaintiff". *Bailey v. Ryan Stevedoring,* U.S.D.C. M.D.La. Civil Action No. 71-79-B, Petition for Writ of Certiorari Appendix "I". A further indication of the lack of the depth of Petitioner's own desire for merger can be had by an examination of Appendix "0" of the Petition for Writ of Certiorari which shows that the Petitioner never filed a charge of discrimination against the "White" local, 1833, with the E.E.O.C., and accused his own Local, 1830, only of conspiring with stevedoring companies to refuse him employment because he had attempted to "obtain equality of employment for negroes".

It is clear from the opinion of the District Judge that the goal of the Petitioner's action was the advancement of his personal political ambitions within the Union. The District Judge observed that even in the face of compliance with the Fifth Circuit's merger mandate the Petitioner interposed objections out of frustration at his inability to be elected Union President, and that he "did what he could to interfere with the orderly merger of the two unions". *Bailey v. Ryan Stevedoring Company, Inc.,* U.S.D.C. M.D.La. Civil Action NO. 71-79-13, Opinion of Polozola,

Distsrict Judge, Petition for Writ of Certiorari, Appendix "I". The plaintiff's self-centered attitude throughout the course of the litigation had previously been remarked upon by the Fifth Circuit. *Bailey v. Ryan Stevedoring Company, Inc.*, 528 F.2d 551, 555, 556 ftn. 10, (5th Cir. 1976).

At least one court has noted that a failure to seek amicable resolution of a grievance can be a factor in denying an attorney's fee award to a prevailing party. *See, Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1370 (N.D.N.Y. 1977) (attorney's fees award denied to successful plaintiffs whose challenge to an "antiquated" city ordinance was "more contrived than real").

Respondents submit that the Distsrict Judge, who oversaw the merger of these local unions and who duly noted the Petitioner's obstructionist, recalcitrant behavior in his reasons for denial of the attorney's fee award request, has sufficiently set forth special circumstances justifying that denial.

C. The District Court Properly Exercised its Discretion in Denying Petitioner's Claim for Attorney's Fees.

In *Hensley, supra* at 1941, this Court recognized that the District Court has a "superior understanding of the litigation" insofar as the exercise of discretion in calculating the amount of an award of attorney fees.

Respondents respectfully submit that although it has been held that the "court's discretion to deny a fee award to a prevailing plaintiff is narrow", *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68, 100 S.Ct. 2024, 2033, 64 L.Ed.2d 723 (1980), due consideration should be given to the District Court's superior

opportunity to evaluate the demeanor and deportment of the party claimant. Respondents further submit that no abuse of discretion has occurred in this instance.

CONCLUSION

This Court has, in the recent past, declined to offer a more specific test of prevailing party status than those tests currently used by the various Federal Circuit Courts. See, e.g. *Uviedo v. Steve's Sash & Door Company,* Petition for Writ of Certiorari denied, —U.S.- 106 S.Ct. 791 (1986), *Kentucky v. Graham,* —U.S.- 105 S.Ct. 3099, 3105 ftn. 9, (1985).

Respondents submit that, in the case at bar, the central issue test employed by the United States Court of Appeals, Fifth Circuit, in conjunction with the "special circumstances" of this litigation, has worked no inequity on Petitioner in resulting in a denial of an award of attorney's fees.

The Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of June, 1987 served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

GILBERT R. BURAS, JR.